



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 2103 OF 2007

JOSEPH GICHURU MARARO1ST PLAINTIFFS/RESPONDENT

WINFRED WANJIKU GICHURI.....2ND PLAINTIFF/RESPONDENT

VERSUS

GRACE WAMBUI KIRUTHI

(SUED AS WATAIYA KIRUTHI)DEFENDANT/ APPLICANT

RULING

The Defendant filed a notice of motion application dated 7th November 2013 brought under Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The Defendant prays that the court be pleased to set aside its judgement delivered on 19th September 2013 and reinstate her statement of defense and counterclaim dated and filed in court on 29th May 2009. The Defendant seeks a further order that the court be pleased to reinstate its orders granted on 27th March 2007 to prevent justice from being defeated through alienation of the suit property.

The application is supported by the Defendant's affidavit sworn on 28th January 2014 where she asserts that the suit proceeded for hearing in her absence owing to a medical condition she has been suffering from and which saw her in hospital on the material hearing date. The Defendant has annexed as evidence a letter dated 3rd July 2013 from Tigoni District Hospital indicating that she was attended in the hospital on 3rd July 2013 and was given a 1 day off duty with effect from the said date.

The Defendant has contended that on 27th March 2007, the court ordered all parties to vacate the suit parcel. It is the Defendant's averment she is desirous to have her side of the story heard so that a just decision can be arrived at otherwise she stands to suffer irreparable loss and damage. She averred that the plaintiffs would not suffer any prejudice were the suit to be reinstated.

In a supplementary affidavit sworn on 7th June 2014, the Defendant contended that she had been ailing for a long time and averred that the medical sheet from Tigoni Hospital was genuine. According to the Defendant, the Plaintiff failed to disclose to the court all facts of the case as had previously been done in Karuri Land case no. LND/16/2/6/2006 where he had stated that he purchased the land from Njoro Mugo and Wairimu Mugo. Further, the Defendant alleged that Gatheca Itate only signed the transfer

forms and the proceedings before the Karuri land disputes tribunal have been annexed as evidence.

It was also contended by the Defendant that during hearing, the Plaintiffs did not produce any documentary evidence of how they acquired the suit property. Further, the Defendant averred that the 1st Plaintiff did not disclose to the court that he had worked in the ministry of lands for years and was at one time stationed at Kiambu, the seat of the registry to the suit land. While stating that the sale of the suit land by the Plaintiffs did not preclude the court from hearing the suit and dispensing justice without harming any third party, the Defendant contended that the sale was a fraudulent attempt by the Plaintiffs to fast track the initial fraud. Lastly, the Defendant averred that it was only fair and just that her side of the story is heard and she is accorded an opportunity to cross examine the Plaintiffs in the re-hearing of the main suit.

The 1st Plaintiff filed a replying affidavit sworn on 13th May 2014 where he stated that this suit came up for hearing on 23rd April 2003 when the court noted that the Defendant had not attended court since February 2012 and that her absence had caused several adjournments. Further, the Defendant contended that the court gave them another hearing dated and directed that the Defendant be served personally to appear in court for hearing on 3rd July 2013. It is the 1st Plaintiff's contention that the Defendant was personally served on 17th June 2013 and further, that the Defendant had not denied having been served with a notice for hearing of 3rd July 2013.

According to the 1st Plaintiff, the Defendant was not sick on 3rd July 2013 as she would have sent someone to inform the court of the same. The 1st Plaintiff has averred that the Defendant merely wants to re-open the suit and continue delaying the same as she had previously done to his prejudice. Further, the 1st Plaintiff contended that the delay in filing this application since the matter was heard was unexplained, inordinate and calculated to deny him the fruits of his judgement.

While asserting that the medical sheet from Tigoni Hospital was probably a forgery, the 1st Plaintiff stated that the Defendant was an elderly lady who does not work anywhere and that it was unusual for her to get an off duty leave from the hospital unless the same was calculated to deceive.

The 1st Plaintiff stated that after the judgement, they sold off the suit property to Rose Muguchu and were in the process of finalizing the sale and a copy of a sale agreement dated 6th November 2013 was exhibited. Lastly, the 1st Plaintiff contended that no purpose would be served in re-opening this suit since the Defendant's defence and counterclaim as well as evidence and documents on record were considered and dismissed by the by the court in the judgement.

Parties relied on their affidavits. The issue for determination by this court is whether the Defendant has established a case to enable this court set aside the *ex parte* judgment entered in this case. The court's power to set aside judgment entered pursuant to an *ex parte* hearing is provided for by Order 12 Rule 7 of the Civil Procedure Rules. The principles upon which the court acts in an application to set aside a judgment entered pursuant to an *ex parte* hearing are similar to the principles to be considered when making a determination in an application seeking to set aside a judgment entered in default of appearance. See **Njagi Kanyunguti & 4 others -vs- David Njeru Njogu Nairobi CA No. 181 of 1994** and **Kitts Mbatu Mukonyole -vs- Levi Ndombi Mukonyole, Kisumu Civil Application No. 15 of 2013.**

In the case of **Shah –vs- Mbogo & another (1967) EA 116** at page 123, it was held that the discretion to set aside a judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

In this case, the Defendant tendered a letter from Tigoni District Hospital dated 3rd July 2013 indicating that she was attended at the hospital on 3rd July 2013 when the hearing of this case took place. Although the Plaintiffs have challenged the authenticity of the said letter, they have not provided any evidence to

substantiate their allegations. No real basis has been laid for the court to reject the medical report availed to the court by the Defendant to explain her absence in court on the hearing date. It is probable that indeed the Defendant was unwell and required treatment on the date the matter was scheduled for hearing. The fault that the defendant may have committed her failure to get somebody to pass this information to the court. Whichever way but then a sick person is literally “**not normal**” and may act and respond in a manner that ordinarily may not be considered to be rational taking into account the circumstances. I am persuaded the Defendant explanation for failure to attend court is justifiable and reasonable and I feel she ought to be allowed to have her day in court. In the case of **Sebei District Administration – vs – Gasyali and others (1968) EA 300**, the court stated that in considering an application to set aside an ex parte judgment, the court should consider *inter alia* whether the Plaintiff can reasonably be compensated by costs for any delay occasioned and that denying litigant a hearing should be the last resort of a court.

The subject matter of this suit involves land and the court's main concern is to do justice to the parties. See **Chemwolo & anor –vs- Kubende (1986) KLR 492**. Considering the nature of the claim, the ends of justice will be better served by allowing the Defendant to ventilate her claim. I will therefore exercise my discretion to allow the Defendant’s application and I accordingly reinstate the Defendant’s Statement of defence and counterclaim and direct that the parties proceed to fix this suit for hearing on a priority basis before any ELC Judge other than myself in view of the fact that I had heard the plaintiff exparte and rendered a Judgment and there is therefore a possibility I may have formed views and opinions on the evidence in the matter.

I award thrown away costs to the plaintiff for the application which I assess at Kshs.10,000/- which the Defendant should pay to the plaintiff before the next hearing date for the suit.

Ruling dated, signed and delivered in Nairobi this **28th** day of **October** 2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiffs

..... for the Defendant